

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH LEE BRICKEY,

Defendant-Appellant.

UNPUBLISHED

January 9, 2007

No. 261726

Washtenaw Circuit Court

LC No. 03-001939-FC

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant Joseph Lee Brickey appeals as of right from his conviction and sentence for five counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(iv) [penetration by a teacher of a person between 13 and 16 years of age enrolled in the same school]. Washtenaw Circuit Judge Archie C. Brown sentenced defendant to concurrent terms of 15 to 40 years' imprisonment on count I and 17 to 40 years' imprisonment on counts II-V. We affirm.

Trial Time Limitation

Defendant argues that the trial court denied defendant the ability to present a defense by restricting the amount of time allotted for the presentation of witnesses, for defendant's testimony and for defense counsel's closing argument. This Court reviews de novo the question whether a defendant was denied his constitutional right to testify or to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002); *People v Solomon (Amended Opinion)*, 220 Mich App 527, 533-535; 560 NW2d 651 (1996).

Defendant's trial began on Monday, January 3, 2005. Near the end of the proceedings on Tuesday, January 4th, the trial court noted:

As I indicated [in chambers] the testimony in this case will conclude Monday at 4:00 o'clock. I don't care where we are with regard to witnesses. Certainly, the parties have more than enough time to schedule their witnesses and get through the exam in an appropriate way to get all their witnesses that they believe is [sic] necessary and appropriate. Allotting them forty-five minutes of . . . closing argument for both the People and the defendant and assuming the jury instructions will take about thirty minutes. The intent of this being that the jury will have the case by 6:00 o'clock on Monday.

At the beginning of the fourth day of trial, on Thursday, January 6th, the trial court noted that Girard had testified for more than six hours on direct and that defendant's cross-examination of her had consumed in excess of ten hours of actual trial time. The trial court thus restricted defendant to an additional 45 minutes of cross-examination, in accordance with defense counsel's prior statement that that was how much longer was needed. The trial court explained:

... This proceeding is going to conclude at 4:00 with regard to testimony.

How the parties want to proceed is up to them. You've got forty-five more minutes on cross exam with [Girard.] I may have further rulings limiting testimony and times of either the prosecutor or defense attorney and I'll make those if that becomes necessary. We need to get this moving along.

The prosecution rested at 12:07 p.m., on Friday, January 7th. Later that afternoon, the trial court advised the jury that it had "every confidence" that the jury would "have the case late Monday afternoon for deliberations"

Defendant called eighteen witnesses over the course of Friday afternoon and Monday. At 4:15 p.m. on Monday, January 10th, defense counsel advised the trial court that defendant wished to testify. The trial court stated:

Okay. Well, here's our problem. Our problem is last Tuesday I said testimony was ending at 4:00 o'clock. As I do on some occasions [sic] prosecutor's direct examination took seven hours and one minute. Cross exam by you was eleven hours and fifty-four minutes. The direct case for the defendant was six hours and forty minutes. The prosecutor's cross was an hour and fifty one.

In other words, the prosecutor has used eight hours and fifty-two minutes in asking questions of witnesses. Defense has used eighteen hours and thirty-four minutes. You've had more than enough time to plan this out. You're entitled to fifteen minutes and that's it of your client. [The prosecutor] will have an opportunity of fifteen minutes of cross as well. And then the jury's getting this case. We're not delaying this anymore.

Defendant's direct testimony began at approximately 4:51 p.m., after a brief discussion of jury instructions and a short break. The trial court advised defense counsel that he "need[ed] to wrap it up" after thirteen transcript pages of testimony and again nine transcript pages later. The prosecutor's cross-examination ended at 5:35 p.m., and consumed 12 ½ pages of transcript.

Defendant argues that the trial court's "arbitrary" time limitation on the length of the trial and the length of defendant's testimony violated his constitutional right to testify and to present a defense. We agree.

A trial court is entitled to control the proceedings in its courtroom. *People v Arquette*, 202 Mich App 227, 232; 507 NW2d 824 (1993). MCL 768.29 provides that, "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and

effective ascertainment of the truth regarding the matters involved.” Similarly, MCR 6.414(B), provides that “[t]he trial court must control the proceedings during trial [and] limit the evidence and arguments to relevant and proper matters.” And, MRE 611(a) provides that, “[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time.”

However, these considerations must be balanced against a defendant’s important right to testify on his own behalf. As a panel of this Court explained in *People v Houston*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2003 (Docket No. 239682):

A criminal defendant's constitutional right to testify is grounded in the Fifth, Sixth and Fourteenth Amendments, as discussed in *Rock v Arkansas*, 483 US 44; 107 S Ct 2704; 97 L Ed 2d 37 (1987) and *People v Solomon (Amended Opinion)*, 220 Mich App 527, 533-534; 560 NW2d 651 (1996). The right is implicated not only where the court precludes a defendant from testifying, but also where the court restricts the scope of a defendant's testimony. See *Alicea v Gagnon*, 675 F2d 913 (CA 7, 1982) (alibi testimony precluded). The right to testify is not without limitation and may “bow to accommodate other legitimate interests in the criminal trial process.” *Id.*, p 55, quoting *Chambers v Mississippi*, 410 US 284, 295; 93 S Ct 1038; 35 L Ed 2d 297 (1973); *Solomon, supra*, p 534. However, “restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve.” *Rock, supra*, pp 55-56. [Slip op, p 5.]

In *Houston*, the trial court imposed time limits on the defendant’s testimony as a sanction for his tardiness in appearing for the third day of trial. As the *Houston* panel explained:

The [trial] court expressed its concern about the length of the trial on several occasions in the first two days of trial. On the third day of trial, defendant arrived at the courtroom three hours late. Although the trial proceeded in his absence . . . the [trial] court determined that defendant's conduct warranted a penalty. The [trial] court stated, “Due to defendant's failure to appear this morning, I'm placing time constraints at this point pursuant to MRE 611. You have a half hour to do your direct, half hour to do cross, 15 minutes for redirect.”

Throughout defendant's testimony, the court reminded counsel of the restrictions. During the direct examination, the court interrupted defense counsel's questioning to remind him of the time limitation:

THE COURT: Ten minutes or actually five minutes.

[DEFENSE COUNSEL]: Judge, I need – okay.

THE COURT: You had-but your client wasn't here for three hours.

[DEFENSE COUNSEL]: Well, if you don’t want to hear why he was late, Judge.

THE COURT: Seven minutes, daylight's burning.

Subsequently, the court responded to an objection by the prosecution by stating, "Let's wind it up." Later, after defense counsel asked defendant a question, the court interposed, "Time's up. You can finish this last question." Defense counsel asked four questions, and the court ended the questioning by stating, "Thank you." Defense counsel indicated that he wanted to admit a photograph into evidence before defendant left the stand and attempted to continue questioning. However, the court asked the prosecutor to stipulate to the contents of the photographs and their admissibility. At the beginning of cross-examination, the court reminded the prosecution of its time limit. Time limits were mentioned again during re-direct examination of defendant. After the court repeatedly sustained objections to defense counsel leading the witness, defense counsel apologized and stated, "I'll try to slow down but I've been put on time constraints. I'm moving and it may be a mistake on my part." The prosecutor noted, and the court agreed, that both sides had been put on time constraints. The court then stated, "The more you talk, the less time you have for questions." [*Id.*, slip op. at 3-4.]

The *Houston* panel recognized the trial court's authority to control the proceedings pursuant to MCL 768.29, MCR 6.414 and MRE 611, and noted that, as explained in *Hartland Twp v Kucykowicz*, 189 Mich App 591, 595-596; 474 NW2d 306 (1991), this authority includes the discretion to impose time limits on the examination of witnesses. *Id.* at p 4. The panel concluded, however, that the trial court's imposition of time limits on the defendant's testimony was arbitrary and was contrary to the aims of MCL 768.29, MCR 6.414, and MRE 611(a). Therefore, the panel concluded that the time limits violated the defendant's constitutional right to testify. *Id.*

Defendant argues that, as in *Houston*, the trial court's limitations were arbitrary and were issued regardless of their impact on the ascertainment of truth. We agree. The trial court imposed an overall time limitation for this case beforehand. The trial court was willing to deviate only slightly from that pre-planned schedule when, because of the time it took to present prior evidence, defendant was not left with any time to testify on his own behalf. Defendant faced grave charges with the possibility of lengthy sentences. He was entitled to sufficient time to testify on his own behalf as part of his defense. The trial court abused its discretion and denied defendant this important right by imposing the an unreasonably short time limit of fifteen minutes for defendant's direct testimony.¹

However, even though we agree with the merits of defendant's assertion that the trial court's limitation of his testimony violated his constitutional rights, we do not find that any error by the trial court in this regard warrants reversal. The limitation on defendant's right to testify is an error that "occurred during the presentation of the case to the jury, and may therefore [] be

¹ Although the trial court told defense counsel he had 15 minutes to examine defendant, the record indicates that the examination lasted approximately 30 minutes.

quantitatively assessed in the context of other evidence presented in order to determine whether [the limitation] was harmless beyond a reasonable doubt.” *Solomon, supra* at 536.²

Despite the limitation imposed, defendant was allowed the opportunity to recount his version of what was the crux of this case, i.e., what happened during the four occasions when he admittedly took Girard to a hotel room. He explained that he only went to the hotel with her because she was so upset about her family situation and they needed a private place to talk. He denied any sexual conduct with Girard and, while admitting that he may have exercised bad judgment, stated that he was not guilty of the charged offenses. Further, he explained why Girard might have a motive to accuse him falsely, because of specific instances when he had to discipline her. Most notably, defense counsel’s questions were not actually cut off by the trial court as occurred in *Houston*; counsel, instead, finished his examination of defendant by stating he had no further questions. Finally, on appeal, defendant does not identify testimony he was prevented from presenting. Rather, he vaguely asserts only that his right to testify and present a defense was violated because he was unable to tell ‘his whole story.’

The prosecution presented Girard’s testimony that defendant engaged in the charged sexual conduct on three occasions at the Red Roof Inn in Ann Arbor. Hotel records and defendant’s admission showed without any dispute that he took Girard to the hotel on those occasions. Email messages defendant sent to Girard were also uncontested. In them, defendant professed his love for Girard, stated that he and Girard were “friends in love with each other very much,” and expressed his desire that they be “together.” On the basis of this evidence, the jury determined defendant to be culpable, even though it had heard his exculpatory testimony, albeit limited.³ On this record, the prosecution having presented “overwhelming evidence of

² Use of the “harmless beyond a reasonable doubt” standard of review assumes that the constitutional error raised here was preserved through an objection at trial. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Arguably, the issue was forfeited at trial, meaning that a lesser “plain error” standard of review would apply on appeal. *Id.* The record suggests that defendant was not planning to testify but decided to do so at the last minute even though defense counsel acknowledged that the court’s “time frame” had elapsed. Apparently in light of that, defense counsel asked the court if defendant could testify (“if the court has time I have one more witness”) and raised no objection when the court allowed 15 minutes for that testimony. In fact, defendant apparently testified for approximately 30 minutes, during which the trial court twice advised his counsel that “you need to wrap it up.” While defense counsel was thus under some pressure to limit the time he spent examining defendant, he was not finally cut off from any further questions but was apparently allowed to ask those that he thought were most important in presenting a defense. At no time was an objection made regarding the time pressures imposed.

³ The trial court’s time limitation also impacted the prosecutor’s ability to cross examine defendant regarding his account. The record reveals various inconsistencies that could have been more fully developed. For example, when first confronted with the instant charges, defendant explained that he was to give a lecture at Eastern Michigan University and it was his habit to rent a room at the hotel to drop off his equipment and practice beforehand. He took Girard with him to speak with her; his plan was to drive to Ann Arbor with the equipment, speak with Girard, take her back to Southgate and then return to Ann Arbor to practice his speech. Defendant later told Ann Arbor police that the first time he took Girard to the hotel, they were on their way to
(continued...)

defendant's guilt," error by the trial court in limiting defendant's testimony was harmless beyond a reasonable doubt. *Solomon, supra* at 539.

Defendant also claims that the time limits prevented him from introducing the deposition testimony of Jackie Stench, a former JROTC member serving in Iraq at the time of trial. However, there is no indication on the record that defendant wished to introduce that testimony, but that he was prevented from doing so. Therefore, this issue is unpreserved. Further, Stench's testimony was duplicative of other testimony as to defendant's good character, the nature of the JROTC program and defendant's role as a father figure to JROTC members in that context. Defendant presented the live testimony of Joe and Megan Kallenbach regarding these issues. Defendant does not indicate anything that Stench's testimony would have added. Defendant cannot establish reversible error based on an assertion that he was not afforded sufficient time to introduce Stench's redundant and cumulative testimony.

Defendant further notes that, during defense counsel's closing argument, the trial court advised counsel that there were five minutes remaining of counsel's allotted 45⁴ minutes for closing and then "cut [counsel] off advising him that his allotted time was over." Defendant asserts that these interruptions "would have diminished defense counsel's credibility with the jury by the court implying that the defense closing argument was unimportant." However, the parties were made aware, early in the trial, that they would each have 45 minutes for closing argument. And, as the prosecutor began his rebuttal, the trial court advised him that he had ten minutes of his allotted time remaining and similarly ended the prosecutor's argument at the expiration of his allotted time. In context, the trial court's evenhanded actions conveyed only that the parties had a certain amount of time in which to make their closing arguments, and that each used that allotted time.⁵

Prosecutor's Argument

Defendant contends that, during his closing argument, the prosecutor impermissibly vouched for Girard's credibility and interjected his personal opinion that she was telling the truth. He also says that the prosecutor improperly suggested that defense counsel's cross-examination tactics were inappropriate, denigrating defense counsel by indicating that the trial

(...continued)

EMU to return equipment when he became lost because of road construction. He exited the expressway and happened upon the Red Roof Inn. Girard was insisting that they go somewhere private to talk, so defendant rented a room so they could do so. Defendant also explained that on the other occasions he and Girard went to the hotel, they were in the area to gather information about an orchard and Domino's Farms for field trips although he admitted that they never went to either place. Defendant did not mention to Ann Arbor Police that he was to speak at a conference or that he rented the hotel room to drop off equipment and practice a presentation. In the face of inconsistencies like this, defendant may well have received more of a benefit from the time limit placed on the prosecutor than the cost imposed against him in presenting his account.

⁴ In his brief, defendant mistakenly states that counsel was allotted 15 minutes.

⁵ For the same reason, defendant was not prejudiced in this regard by the trial court's admonitions to both defense counsel and the prosecutor to "wrap it up" during defendant's testimony.

was not conducted on “a level playing field,” and that he treated Girard inappropriately and unfairly by his extensive cross-examination.

Defendant did not object to the prosecution’s closing argument below. Therefore, this issue is unpreserved for appellate review. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting defendant’s substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only when plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the proceedings. *Id.* at 448-449.

The prosecutor made the following remarks during his closing argument:

Samantha Girard testified on Monday. As a matter of fact, Samantha Girard testified on Tuesday, Wednesday and Thursday as well. You had plenty of exposure and time to get to know Samantha Girard. More than a lot of jurors do. And in a strange way I’m very glad that Samantha was on the stand for as long as she was. Because as I told you before the trial starts if you are satisfied beyond a reasonable doubt that Samantha Girard is telling the truth you needn’t go any further. You may stop there.

And Samantha Girard gave you plenty of reasons to believe her beyond a reasonable doubt. Her testimony was sincere, credible and I believe that she was telling the truth. I believe that the proofs show that she was telling the truth.

But moreover it’s unfortunate that Samantha Girard had to be the center of this trial for the last six days. The Judge is going to read you an instruction soon that says you, you collective and individually decide who is credible and who is not. You decide which witnesses you believe and which you do not. You use your own common sense and your everyday experience to make that decision. You can believe all, some or none of somebody’s testimony. You are the people that decide that.

In addition to your everyday experiences and your common sense you need to decide collectively and individually how you’re going to make that decision about credibility. How do you know[?] You’ve never met these people. You don’t know anything about this case other than what you’ve heard in this courtroom. And that’s exactly why you’re sitting in that box.

I suggest to you that you need to take into consideration prospective [sic], prospective [sic] and bias. You need to think about what Samantha Girard went through on the witness stand. You need to decide if this was an equal playing field. Samantha Girard testified for about two and a half hours over Monday and Tuesday on direct when I was asking her questions. Then for the remainder of Tuesday, all of Wednesday morning and then for some time on Thursday she was subjected to cross examination by [defense counsel].

You have Samantha Girard, a seventeen year old young woman. A young woman who's still in high school whose testifying in court, which is an unfamiliar, uncomfortable surrounding for her. Someone who's definitely nervous on the inside. Someone who's discussing events that happened to her a year and a half ago.

Someone who is discussing . . . to say difficult subject matter would be to put it lightly. I mean we're talking about intimate details of an experience that if it were . . . an enjoyable positive experience no one talks about it. Adults don't talk about it. But she had to not only get on the stand and tell you about it she had to be subjected to [defense counsel]. Now this is the way the system works. We test each other's witnesses' credibility that's the adversarial system and that's the best system in the world. I'm convinced of it.

[Defense counsel]; law school educated; experienced lawyer he gets to ask her leading questions. He gets to make up questions and frame them such that he gets the answers he expects or, or not. But he gets to ask the questions. And ask yourselves, is that a level playing field[?]

She was on the witness stand under cross examination for hours and hours. Again, it span [sic] over three days. You've learned that she made detailed statements to the police. You've learned that she testified at [sic] preliminary examination some time ago under oath. And you've learned that her statements have been to an extreme degree consistent over and over and over. Twice tested by defense attorneys. Twice from a stand in court subjected to cross examination. And they've been consistent.

Your common sense will tell you that the hallmark of a lying witness is inconsistencies. Lies don't stand the test of time. . . . People cannot regurgitate detail after detail after detail consistently unless it's the truth. Unless she really was testifying from her memory. . . .

There were no inconsistencies. There were no inconsistencies in her testimony. *And so what we've heard about for the last six days has been her character. This has been a case of character assassination. In many ways, Joseph Brickey has not been on trial here. In many ways it's been Samantha Girard and that's not right and that's not fair and that's not the way the witness [sic] is supposed to work.*

Witness after witness today [and] Friday to talk about Samantha has problems, Samantha has issues, her sister died, she was jealous of her sister, she's a liar, her father abused her or her father put her up to this. Her mother put her up to this. Over and over and over.

What does that say about this case? We have heard details about Samantha Girard that she'll probably never talk about again. Things that are so mundane and irrelevant that they absolutely do not bear on this case whatsoever.

And we spent precious little time talking about what happened in those hotel rooms. The subject of this trial is what happened in those hotel rooms. Do not let them sway your focus from why you're here. (emphasis added).

The prosecutor ended his closing argument by commenting, "If you believe Samantha Girard beyond a reasonable doubt, you don't have to go farther. I submit to you there is absolutely no reason not to believe her."

Issues of prosecutorial misconduct are decided on a case by case basis by reviewing the pertinent portion of the record in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test is whether the defendant was denied a fair trial. *Id.* The remarks must be read as a whole and evaluated in light of defense arguments and the relationship to the evidence admitted at trial. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). Prosecutors are afforded great latitude during argument, and they may argue the evidence and all reasonable inferences that arise from the evidence in relationship to the theory of the case. *People v Knapp*, 244 Mich App 361, 381-382 n 6; 624 NW2d 227 (2001).

Certainly, a prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, a prosecutor may comment on his own witnesses' credibility, and may argue from the facts that the witness has no reason to lie, "especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). A prosecutor may also argue that a witness should be believed. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

Defendant argues that the prosecutor's remarks regarding Girard's credibility constituted impermissible vouching. However, the prosecutor did not indicate that he had any special knowledge that Girard was being truthful. Rather, his comments were addressed to the reasons that Girard was worthy of belief. The prosecutor reminded the jury that they were the ultimate determiners of credibility and he appealed to the jury to use its own common sense to determine, from Girard's appearance on the stand, whether she was being truthful. Further, while the prosecutor's comment that he believed that Girard was telling the truth may have been improper, the jury was instructed that they were to decide the case based on the evidence, that the statements and arguments of the lawyers are not evidence, that it was their duty to decide the facts of the case, and that they were to "decide what each piece of the evidence means and how important [they] thought it was," including "whether [they] believe what each of the witnesses said." This instruction dispelled any prejudice that may have resulted from the prosecutor's comments. *Bahoda, supra* at 281. Therefore, defendant was not deprived of a fair and impartial trial by the prosecutor's remarks relating to Girard's credibility.

Defendant argues that the prosecutor impermissibly denigrated defense counsel by suggesting that his trial tactics, in cross-examining Girard and placing her character at issue, were inappropriate. Defendant points specifically to the prosecutor's remarks that the playing field was not equal between Girard, a high school student, and defense counsel, an experienced lawyer who "gets to make up his question and frame them" as he wishes.

A prosecutor may not question defense counsel's veracity, suggest that defense counsel is intentionally attempting to mislead the jury, personally attack defense counsel or denigrate the defense. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996); *People v Dalessandro*, 165 Mich App 569, 579-580; 419 NW2d 609 (1988); *Wise, supra* at 101-102. However, a prosecutor may point out deficiencies and limitations in a defendant's theory of the case. *People v Howard*, 226 Mich App 528, 544-545; 575 NW2d 16 (1997).

Reviewing the prosecutor's comments in their full context, we conclude that the challenged comments did not constitute denigration of defense counsel, his tactics or theories. Rather, they were directed at reasons that the jury should believe Girard: that despite extended and skillful cross-examination by an experienced attorney, her testimony remained consistent. The prosecutor's remarks did not imply that defense counsel was intentionally attempting to mislead the jury, did not challenge defense counsel's veracity, did not attack defense counsel's personality or character, and did not ask the jury to convict defendant because of defense counsel's conduct. Therefore, the challenged comments were not improper. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003).

Cross-Examination of Witnesses

Defendant claims that the trial court erred in depriving defendant of the opportunity to cross-examine Girard and Gillen about a conversation that was overheard between Girard, Browe and Gillen, during which someone commented that someone else, presumably Girard, was changing her "story" or getting it "mixed up." The case, in large part, depended on the jury's assessment of the credibility of Girard and defendant. Therefore, defendant argues, any evidence that tended to reflect on their credibility, including whether these "coaching type of comments" were made, was relevant and should have been admitted.

The question of the admissibility of testimony relating to statements allegedly made by Gillen or Browe to Girard was addressed to and decided by the trial court. Therefore, this issue is preserved for appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Id.*

During the second day of trial, defense counsel asserted that three individuals advised him that they observed Gillen, Browe and Girard (all witnesses at trial) go into a bathroom together, and then overheard someone make a comment to the effect that Girard needed to stop changing her testimony. Defense counsel alleged that this conversation violated the court's directive that witnesses not discuss their testimony outside the courtroom. The trial court took testimony relating to these allegations outside the presence of the jury.

The three individuals testified as defense counsel said they would, but their testimony was controverted by Gillen. Gillen testified that she, Browe and Girard did walk to the restroom during a break in proceedings. She was not aware of anyone walking behind them in the hallway. As they were walking down the hallway, they "were talking about Sam [Girard] and how strong she was and just how proud of her" Gillen and Browe were. While in the bathroom, Browe told Gillen that she was worried about testifying because she was concerned that the issue of her smoking marijuana would come up while her father was in the courtroom. Girard did not

voice any concern over her testimony and nothing was said regarding Girard “changing [her] story” or getting her “stories mixed up.” After hearing this testimony, the trial court concluded that there had not been a violation of its sequestration order.

Later, during his cross-examination of Girard, defense counsel attempted to question Girard about whether Gillen made a particular comment to her in the restroom the previous day. The trial court sustained the prosecutor’s objection, and ruled that counsel could not inquire of Gillen whether she made any such statement, on the basis that the alleged statement bore no relevance to the matter at hand and would unduly prejudice the jury.

As noted above, the decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003); *Aldrich, supra* at 113. An abuse of discretion exists if the results are outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A preserved, nonconstitutional evidentiary error does not merit reversal unless it involves a substantial right and it affirmatively appears from the entire record that it was more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998); *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998); *People v Gonzalez*, 256 Mich App 212, 218; 663 NW2d 499 (2003). Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. *Aldrich, supra* at 114. The credibility of witnesses is also a material issue and evidence that shows bias or prejudice of a witness is always relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, mod, rem’d 450 Mich 1212; 539 NW2d 504 (1995). Further, however, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury.” MRE 403.

We question the trial court’s apparent initial conclusion that whether Gillen or Browe warned Girard that she needed to stop changing her testimony was completely irrelevant to the determination of Girard’s credibility. Arguably, such statement, if made, would “throw light,” however dim, on the veracity of Girard’s testimony, and therefore, it was relevant to a determination whether the charged conduct occurred. Nonetheless, the trial court was correct in its apparent further determination that defense counsel’s questioning in this regard would mislead the jury by confusing the issues. The question for the jury was not whether someone else (Gillen or Browe) considered Girard’s account to be inconsistent and, thus, incredible; it was within the exclusive province of the jury to make that determination for itself. Testimony about the opinion of Gillen or Browe on that issue would thus have only confused the issue and misled the jurors as to how they should properly determine Girard’s credibility.

Further, given Gillen’s previous testimony that neither she nor Browe made any such statement to Girard, defendant cannot establish that any error by the trial court in prohibiting defense counsel’s questioning of Girard and Gillen on this point was outcome determinative. Certainly, Gillen would have reiterated her denial that any such statement was made and,

presumably, Girard would have also denied it. Considering the evidence presented against defendant, including the email messages he sent to Girard and Girard's testimony regarding defendant's criminal activity, we do not conclude that it affirmatively appears that it is more probable than not that exclusion of this questioning was outcome determinative. *Lukity, supra* at 496.⁶

Motion to Withdraw

Defendant claims that the trial judge abused his discretion in denying defense counsel's motion to withdraw. Defense counsel moved to withdraw before the trial court. Therefore, this issue is preserved. *Aldrich, supra* at 113. This Court reviews a trial court's decision regarding substitution of counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

On December 22, 2004, the trial court held the final pretrial conference. Defense counsel raised the issue of defendant's health, noting that the court had yet to receive medical clearance for defendant to attend the trial.⁷ Counsel explained that:

I don't know if it's because of a progressive nature of what the [d]efendant's physical ailments are or how they impact him emotionally, mentally, certainly, physically; but I can say this, I am no longer comfortable in concluding that this is not a case that must be addressed from a level of some from of diminished capacity. It could be because of the progressive nature of the physical ailments.

I am asking that this Court have an examination, number one, for criminal responsibility. I don't think we can get around that anymore. Number two, for competency, and I'm going to elaborate on that just a little bit here. As things have progressed here, there have always been some questions in terms of the ability of the [d]efendant to assist in his case. However, I've always assumed that we could proceed and get around them. There are things going on here that are above my comprehension, but I am no longer comfortable that the [d]efendant is at the level where he can assist; and, we have differences as to the approach in this case. Differences to the degree that I am motioning this [c]ourt to remove me from this case. I don't believe the [d]efendant would be anywhere financially, except to be consider [sic] indigent, which may mean he may have to have some assistance from a public defender.

⁶ Because we conclude that the trial committed no error for these reasons, we need not consider the merits of the prosecutor's hearsay argument in defense of the trial court's decision.

⁷ Defendant's trial was originally scheduled to begin on Monday, November 8, 2004. However, trial was adjourned after the trial court was informed that defendant, who had been hospitalized the previous Thursday and was suffering from unstable angina and high blood pressure, could be in danger of a heart attack in stressful situations.

But, these issues are cumulative and they effect [sic] the degree to which [d]efendant can get a fair trial. Not necessarily objectively on anyone else's part, but in terms of what is going on on this side of the table alone. I would ask the [c]ourt to consider those. I don't see how we can do a trial January 3rd, a fair trial, but I'll leave it to the [c]ourt to render its decisions.

The prosecutor objected to defense counsel's request for an examination and to withdraw, noting that there was no indication that defendant suffered from any sort of "mental imbalance" and that, "we are a year and a half from when these events occurred [and] . . . almost a year from the first trial date set. This is not the time that an attorney should be allowed to withdraw." Defense counsel reiterated that he had

extended the degree of his competence in this area. Something is going on here, far more complex than what I've dealt with before and I've dealt with criminal responsibility and competence many a day. What I'm looking at here, I believe, has a lot to do with the [d]efendant's exposure to war time chemicals, agent orange or other things that are above and beyond my understanding or my knowledge of the physiology. However, I'll say this, it's obviously progressive. We can check the medical records of the doctors; we can see a progression. All along I've made this Court aware . . . that we were calling into this Court an expert, a world renowned expert, to deal with the medical aspects of this case, which were apparent all along. We've never kept that secret, we just didn't know fully the degree to which the [d]efendant may be impaired.

To go to trial without at least having an examination and an opportunity to explore the physiology and the medical issue, mental issues, that are involved in this case would be a grave mistake.

* * *

The independent individual that we had in mind all along has made suggestions that I have not believed myself at times; but, I believe them now. I see things now and the longer you're on a case, the more you see things. The longer you communicate with your [d]efendant, the more you see things. . . .

The trial court denied defendant's request for competency and criminal responsibility examinations, noting that "[t]here's been no evidence whatsoever . . . indicating any limitations of the [d]efendant with regard to being able to assist in his defense or understanding what the nature of the defense is." The trial court also denied defense counsel's motion to withdraw, given that it also was denying defendant's request to adjourn the trial date of January 3, 2005 and that defense counsel was "certainly as familiar, if not more familiar, than anyone else with this case and has been actively participating in this case."

As noted earlier, this Court reviews a trial court's decision regarding substitution of counsel for an abuse of discretion. *Traylor, supra*. This Court has explained that, while an indigent defendant is guaranteed the right to counsel, he is not guaranteed the right to an attorney of his choice. Thus, appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause

exists where a legitimate difference of opinion develops between the defendant and his counsel over a fundamental trial tactic. *Id.*

The record evidences no legitimate difference of opinion between defendant and his trial counsel. Defense counsel made only a general statement that he and defendant “have differences as to the approach in this case” to the degree that he was moving the court to allow him to withdraw. Defense counsel did not address the nature or extent of those differences beyond that single statement. Rather, the primary focus of defense counsel’s remarks was defendant’s physical and mental condition and its impact on defendant’s ability to assist in his own defense. Thus, there is no basis to conclude that there was “a legitimate difference of opinion” between defendant and his counsel “over a fundamental trial tactic.” *Traylor, supra*. The trial court did not abuse its discretion in denying defendant substitution of counsel.

Sentencing Issues

Defendant argues that the trial court should have departed downward and imposed minimum sentences lower than the guidelines range. The issue whether a downward departure from the sentencing guidelines was supported by substantial and compelling reasons was raised before and addressed by the trial court. Defendant was not required to take any action to preserve this issue for appeal. *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999).

If the trial court sentences a defendant within the applicable guidelines range, this Court must affirm the sentence unless the trial court erred or relied on inaccurate information in scoring the guidelines. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309-311; 684 NW2d 669 (2004); *Babcock, supra* at 261. Defendant does not argue that the trial court erred in scoring the guidelines. Nor does defendant argue that the trial court relied on inaccurate information when sentencing him. Therefore, defendant’s sentence must be affirmed and we cannot consider defendant’s argument that the trial court should have departed downward from the guidelines.

Defendant argues the trial court made impermissible factual findings relating to the guidelines scoring, thus depriving him of his right to a jury trial in contravention of the United States Supreme Court’s decisions in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). However, our Supreme Court recently concluded that Michigan’s sentencing scheme does not offend a defendant’s right to a jury trial on the basis that its sentences are based on facts not determined by a jury beyond a reasonable doubt. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). The Court explained that,

under the Sixth Amendment, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi [v New Jersey]*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000)]. The statutory maximum constitutes “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury’s verdict or admitted by the defendant.” *Blakely, supra* at 303 (emphasis omitted). Under Michigan’s sentencing scheme, the maximum sentence that a trial court may impose on the basis of the jury’s verdict is the statutory maximum. MCL 769.8(1). In other words, every defendant . . . who commits [a particular criminal offense] knows

that he or she is risking [the statutorily established maximum term] in prison, assuming that he or she is not an habitual offender. As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict. [*Id.* at 164.]

Therefore, defendant's argument that the trial court violated his right to a jury trial by considering OVs 4, 8, 10, 11, 13 and 19, without having a jury determine the facts underlying those OVs beyond a reasonable doubt, lacks merit.

We affirm.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens